

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE )  
VARIANCE PERMIT ISSUED BY )  
MASON COUNTY TO BILL PARKER AND )  
DENIED BY STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
WILLIAM PARKER AND MASON COUNTY, )  
Appellants, )  
v. )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent. )

SHB No. 82-41

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the request for review of the disapproval by respondent of a variance issued by Mason County, came before the Shorelines Hearings Board, Gayle Rothrock, Chairman, David Akana (presiding), Nancy R. Burnett, Rodney M. Kerslake, A. M. O'Meara and Lawrence J. Faulk at a hearing on March 11, 1983, in Lacey.

Appellant William Parker and Ken Christianson appeared pro se; respondent was represented by its attorney, Patricia H. O'Brien.

1 | Mason County did not appear.

2 |       Having heard the testimony, having examined the exhibits, and  
3 | having considered the contentions of the parties, the Board makes these

4 |                               FINDINGS OF FACT

5 |                               I

6 |       Appellant proposes to build a 20 foot by 30 foot by 18 foot high  
7 | residential dwelling on lot 49 of Cothary Beach Tracts on the north  
8 | shore of Hood Canal, a shoreline of statewide significance, about ten  
9 | miles west of Belfair. Nine feet of the wood frame structure would be  
10 | placed waterward of an existing bulkhead on a supporting 16 foot by 45  
11 | foot dock. The deck, supported by four concrete columns, extends 16  
12 | feet waterward from the bulkhead.

13 |                               II

14 |       The proposed structure is similar to many other structures in the  
15 | neighborhood. It would intrude much less into the water than  
16 | similarly built nearby residences and the small house located three  
17 | lots to the east of the site. Four lots to the west is a home on a  
18 | bulkheaded and filled lot. The intervening lots have no developments  
19 | near the water.

20 |                               III

21 |       The site is in an area of recreational and permanent homes built  
22 | on 50 foot wide lots. Appellant's lot is about 396 feet deep. Half  
23 | of the lots in the Cothary tract have waterfront homes on them. All  
24 | of the lots in the tract share the presence of a county road  
25 | meandering close to the shoreline. As a result, there is little or no  
26 | building area waterward of the road.

1 Across the county road at the site, the bank rises steeply.  
2 Appellant's upland property is reached by crossing two other lots.  
3 There is a small clearing where appellant maintains a tool shed and,  
4 occasionally, a camper. The property is mostly covered with trees and  
5 other vegetation.

6 IV

7 On December 4, 1972, Mason County Road Department issued a permit  
8 allowing appellant to maintain a covered or sheltered structure  
9 waterward of the road and a parking area on the upland side of the  
10 road, both areas within the county right of way.

11 V

12 On October 6, 1975, respondent approved the Mason County Shoreline  
13 Master Program (SMP).

14 VI

15 On September 17, 1975, Mason County Health Department issued a  
16 permit for the installation of a septic tank system to service a  
17 two-bedroom structure.

18 VII

19 On September 29, 1975, the Mason County confirmed an exemption  
20 from the shoreline substantial development permit requirements for a  
21 "proposed bulkhead for septic and pumping tank containment."

22 VIII

23 On August 15, 1980, Mason County issued a building permit allowing  
24 the construction of a bulkhead for septic and pumping tank containment.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
SHB No. 82-41

IX

On August 21, 1980, Mason County Road Department issued a permit to install utility lines (sewer/water) under the county road to serve the residence.

X

On January 16, 1981, Mason County Road Department issued a permit to construct an access for a residence.

XI

On July 1, 1981, Mason County issued a building permit to construct a two bedroom, one bath wood frame family dwelling on the existing retaining wall and fill, and four concrete pillars for foundation and deck areas. The dwelling permitted is a nominal one story 600 square foot frame building with a 300 square foot loft area and a 280 square foot deck.

XII

On May 10, 1982, respondent received a complaint about appellant's construction. The complaint was referred to Mason County. Two days later, the county issued a stop work order because appellant did not have a shoreline permit for the activities on the property.

On May 25, 1982, appellant applied to Mason County for the necessary permit. On August 30, 1982, Mason County granted a variance from the Shoreline Master Program provisions 7.20.010.C and issued a permit to construct a residential dwelling forward of the urban shoreline setback line. After the variance permit was filed with respondent, documentation of compliance with chapter 43.21C RCW was requested.

XIII

On September 29, 1982, Mason County issued a proposed declaration of non-significance for the project described as "four 10' concrete pilings to support 280 square foot deck for 20 x 30' recreational dwelling."

XIV

On October 7, 1982, respondent disapproved the variance. On November 8, 1982, appellant appealed the decision to disapprove the variance to this Board.

XV

The "ordinary high water mark" (OHWM), as defined in RCW 90.58.030 2(b), is located at appellant's bulkhead. The bulkhead also marks the mean higher high water line at elevation 11.8 feet.

The U. S. Army Corps of Engineers (COE) requires a permit for any work waterward of the line of mean high water (MHW) which is elevation 10.8 feet at appellant's lot.

Appellant's deck and four pillars are located waterward of the COE line of MHW.

Appellant's deck, four pillars, and portions of the proposed residence are located waterward of the OHWM.

XVI

Marine waters lying immediately adjacent to this wetland is considered to be in a rural environment from the line of mean higher high tide to a depth of one fathom; from one fathom to ten fathoms is considered a conservancy environment; from ten fathoms and deeper is considered a natural environment. Section 7.24.050 (A and D).

1 The "wetland" designation at appellant's upland lot is urban  
2 residential. The designation waterward of the bulkhead to the end of  
3 the deck is rural.

4 XVII

5 Section 7.20.010.C of the SMP for urban environments provides:

6 Setbacks - the minimum setback for buildings shall be  
7 15 feet from the line of ordinary high water,  
8 provided that structures shall not extend beyond the  
9 common line of neighboring structures, and new  
construction shall not substantially reduce the view  
of neighboring structures.

10 See also section 7.16.080.A.2 (Residential Development).

11 The setback in a rural environment is 25 feet from the water's  
12 edge, except that no structure shall extend beyond the common line of  
13 neighboring structures. Section 7.20.020.C. The minimum lot width in  
14 a rural environment is 100 feet compared to 50 feet in an urban  
15 environment. For residential development in a rural environment, the  
16 regulations for urban environment apply, except that there are no  
17 exceptions for structural setbacks. Section 7.16.080.

18 XVIII

19 Section 7.16.200.A.6., for piers and docks in an urban or rural  
20 environment, provides:

21 Uses. Pile piers and floating docks are allowed for  
22 use by watercraft, water dependent and water related  
23 recreation. New structures built on piers and docks  
24 shall not be used for residential purposes.

XIX

Section 7.28.020 provides for variance from the provisions of the SMP:

Variances deal with specific requirements of this ordinance and the objective is to grant relief when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this ordinance. The property owner must show that if he complies with the provisions, he cannot make any reasonable use of his property. The fact that he might make a greater profit by using his property in manner contrary to the intent of this ordinance is not a sufficient reason for a variance. A variance will be granted only after the applicant can demonstrate the following:

A. The hardship which serves as a basis for the granting of a variance is specifically related to the property of the applicant.

B. The hardship results from the application of the requirements of the Shoreline Management Act and this ordinance and not from, for example, deed restrictions or the applicant's own actions.

C. The variance granted will be in harmony with the general purpose and intent of this ordinance.

D. Public welfare and interest will be preserved; if more harm will be done to the area by granting the variance than would be done to the applicant by denying it, the variance will be denied.

XX

Any Conclusion of Law which should be deemed a Finding is hereby adopted as such.

From these Findings the Board comes to these

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
SHB No. 82-41

1 CONCLUSIONS OF LAW

2 I

3 The proposed and existing developments are intended to result in a  
4 seasonal or vacation dwelling unit. Other than irregular occupancy,  
5 there is no difference under the master program, that could  
6 distinguish the intended use from that of residential. Both are  
7 "structures" within the meaning of section 7.08.220 of the SMP.  
8 Therefore, it must conform with criteria relating to residences and  
9 residential use.

10 II

11 As set forth in the pre-hearing order, the issue in the case then,  
12 is whether the proposed residence meets the provisions of WAC  
13 173-14-150 (2, 3, 4, and 5) with respect to a variance from master  
14 program provisions 7.20.010.C and 7.16.200.

15 III

16 Mason County expressly granted a variance from section 7.20.010.C  
17 relating to the setback. Apparently, it did not similarly grant a  
18 variance from section 7.16.200 relating to over-water residential  
19 uses. It is also apparent from the Mason County record, that section  
20 7.16.200 was considered in the staff report. The minutes of the Board  
21 of Mason County Commissioners (August 30, 1982) reflect their concern  
22 about the purpose of appellant's "recreational facility." Apparently  
23 relying on the Shoreline Advisory Board's recommendation, the  
24 Commissioners approved a variance for the proposed "residence  
25 structure." As a practical matter, a variance from section 7.16.200  
26 was intended.

IV

Section 7.28.020 of the SMP provides for both "area" and "use" variances. See e.g. Kooley v. DOE, SHB No. 218. In this matter, Mason County has granted both types of variances: one for a setback (7.20.010.C) and one for use (7.16.200).

The state rule, WAC 173-14-150, provides criteria for "area" variances and references WAC 173-14-140 for criteria relating to "uses."

The state rule, WAC 173-14-140 for conditional uses, provides that uses which are specifically prohibited by the master program may not be authorized.

The only issue submitted is whether the disapproval of the "use" and "area" variance under WAC 173-14-150 was correct.

V

Mason County granted a "use" variance from the prohibition of section 7.16.200. This is a proper procedure under the shoreline master program. Department of Ecology review of "use" variances is evaluated using the criteria for conditional uses in WAC 173-14-140. See WAC 173-14-150(5).

WAC 173-14-140(3) provides that "uses which are specifically prohibited by the master program may not be authorized." Because section 7.16.200 of the master program prohibits a pier "use activity" for the purpose of residential "use activity", the pier "use activity" may not be authorized. Respondent's decision must be affirmed.

VI

Assuming appellant could show that the intended use was authorized at the site proposed, appellant must also show that the variance criteria of WAC 173-14-150 (2 through 4) is also met with respect to section 7.20.010.C.

Appellant did not show that the strict application of the bulk, dimensional or performance standards in the master program interfered with a reasonable use of the property, which use is not otherwise prohibited. WAC 173-14-150 (2a, 3a). The intended over-water residential use is prohibited by the Mason County Master Program. We would otherwise conclude that:

Appellant's intended use would be precluded or significantly interfered with by section 7.20.010.C. Such hardship is specifically related to the property and master program provision and not the applicant's own action. WAC 173-14-150 (2b, 3b).

The design of the proposed development would be compatible with existing structures and uses in the area and would be compatible with permitted uses within the rural or urban environment designation. WAC 173-14-150 (2c, 3c).

The variance authorized would not be a special privilege not enjoyed by the majority of the properties in the area. However, the minimum variance necessary to afford relief should be limited to the dwelling described in appellant's building permit. WAC 173-14-150 (2d, 3d).

1 Neither the public rights of navigation, use of the shoreline, or  
2 public interest will suffer substantial adverse or detrimental  
3 effect. WAC 173-14-150 (2e, 3e, 3f).

4 The cumulative impact of granting other variances, where a lot has  
5 been partially developed for residential use under proper authority,  
6 as has this lot, would be small. The chronology of events should be  
7 difficult of duplication.

8 Appellant did not show that all of the criteria of WAC 173-14-150  
9 (2 through 4) were met as required by that regulation. Accordingly,  
10 the respondent's decision should be affirmed.

11 VII

12 Appellant has no vested rights under the Shorelines Management  
13 Act. The building permit he received was a result of an oversight by  
14 Mason County. The remedy for appellant's apparent reliance on the  
15 building permit is a matter to be addressed to the county.

16 VIII

17 Any Finding of Fact which should be deemed a Conclusion is hereby  
18 adopted as such.

19 From these Conclusions the Board enters this  
20  
21  
22  
23  
24  
25

1 DISSENTING OPINION,

2       The decision to uphold the Department of Ecology, in my estimation,  
3 is not compatible with the present use being made with the lots in  
4 this particular plat. The piling the house will sit on is legal and  
5 does not interfere with the little fishies that have to stay closer  
6 to shore. The house proposed does not project as far as the present  
7 constructions on either side, down the beach. No views will be  
8 impaired.

9  
10   
11 A. M. O'MEARA, Member

ORDER

The disapproval of the variance is affirmed.

DONE this 11<sup>th</sup> day of April, 1983.

SHORELINES HEARINGS BOARD

*David Akana*

DAVID AKANA, Lawyer Member

*Gayle Rothrock*

GAYLE ROTHROCK, Chairman

*Nancy R. Burnett*

NANCY R. BURNETT, Member

See Dissenting Opinion  
A. M. O'MEARA, Member

*Rodney M. Kerslake*

RODNEY M. KERSLAKE, Member

See Minority Opinion  
LAWRENCE J. FAULK, Member

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MINORITY OPINION

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1 Mason County did not appear.

2 Having heard the testimony, having examined the exhibits, and  
3 having considered the contentions of the parties, the Board makes these

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7 residential dwelling on lot 49 of Cothary Beach Tracts on the north  
8 shore of Hood Canal, a shoreline of statewide significance, about ten  
9 miles west of Belfair. Nine feet of the wood frame structure would be  
10 placed waterward of an existing bulkhead on a supporting 16 foot by 45  
11 foot dock. The deck, supported by four concrete columns, extends 16  
12 feet waterward from the bulkhead.

13 II

14 The proposed structure is similar to many other structures in the  
15 neighborhood. It would intrude much less into the water than  
16 similarly built nearby residences and the small house located three  
17 lots to the east of the site. Four lots to the west is a home on a  
18 bulkheaded and filled lot. The intervening lots have no developments  
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21 The site is in an area of recreational and permanent homes built  
22 on 50 foot wide lots. Appellant's lot is about 396 feet deep. Half  
23 of the lots in the Cothary tract have waterfront homes on them. All  
24 of the lots in the tract share the presence of a county road  
25 meandering close to the shoreline. As a result, there is very little  
26 building area waterward of the road.

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2 Appellant's upland property is reached by crossing two other lots.  
3 There is a small clearing where appellant maintains a tool shed and,  
4 occasionally, a camper. The property is mostly covered with trees and  
5 other vegetation. The road to this part of his property is only  
6 accessible by a four wheel drive vehicle.

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8 On December 4, 1972, Mason County Road Department issued a permit  
9 allowing appellant to maintain a covered or sheltered structure  
10 waterward of the road and a parking area on the upland side of the  
11 road, both areas within the county right of way.

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14 Master Program (SNP).

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17 permit for the installation of a septic tank system to service a  
18 two-bedroom structure.

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22 "proposed bulkhead for septic and pumping tank containment."

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26 FINAL FINDINGS OF FACT,  
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SHB No. 82-41: MINORITY OPINION

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Appellant's deck and four pillars are located waterward of the COE line of MHW.

Appellant's deck, four pillars, and portions of the proposed residence are located waterward of the OHWM.

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9 common line of neighboring structures, and new  
construction shall not substantially reduce the view  
of neighboring structures.

10 See also section 7.16.080.A.2 (Residential Development).

11 The setback in a rural environment is 25 feet from the water's  
12 edge, except that no structure shall extend beyond the common line of  
13 neighboring structures. Section 7.20.020.C. The minimum lot width in  
14 a rural environment is 100 feet compared to 50 feet in an urban  
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16 regulations for urban environment apply, except that there are no  
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21 Uses. Pile piers and floating docks are allowed for  
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A. The hardship which serves as a basis for the granting of a variance is specifically related to the property of the applicant.

B. The hardship results from the application of the requirements of the Shoreline Management Act and this ordinance and not from, for example, deed restrictions or the applicant's own actions.

C. The variance granted will be in harmony with the general purpose and intent of this ordinance.

D. Public welfare and interest will be preserved; if more harm will be done to the area by granting the variance than would be done to the applicant by denying it, the variance will be denied.

XX

Any Conclusion of Law which should be deemed a Finding is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The proposed and existing developments are intended to result in a seasonal or vacation dwelling unit. Other than irregular occupancy,

1 there is no difference under the master program, that could  
2 distinguish the intended use from that of residential. Both are  
3 "structures" within the meaning of section 7.08.220 of the SMP.  
4 Therefore, it must conform with criteria relating to residences and  
5 residential use.

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7 As set forth in the pre-hearing order, the issue in the case then,  
8 is whether the proposed residence meets the provisions of WAC  
9 173-14-150 (2, 3, 4, and 5) with respect to a variance from master  
10 program provisions 7.20.010.C and 7.16.200.

## 11 III

12 Mason County expressly granted a variance from section 7.20.010.C  
13 relating to the setback. Apparently, it did not similarly grant a  
14 variance from section 7.16.200 relating to over-water residential  
15 uses. It is also apparent from the Mason County record, that section  
16 7.16.200 was considered in the staff report. The minutes of the Board  
17 of Mason County Commissioners (August 30, 1982) reflect their concern  
18 about the purpose of appellant's "recreational facility." Apparently  
19 relying on the Shoreline Advisory Board's recommendation, the  
20 Commissioners approved a variance for the proposed "residence  
21 structure." As a practical matter, a variance from section 7.16.200  
22 was intended.

## 23 IV

24 Section 7.28.020 of the SMP provides for both "area" and "use"  
25 variances. See e.g. Kooley v. DOE, SHB No. 218. In this matter,

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
SHB No. 92-41: MINORITY OPINION

1 Mason County has granted both types of variances: one for a setback  
2 (7.20.010.C) and one for use (7.16.200).

3 The state rule, WAC 173-14-150, provides criteria for "area"  
4 variances and references WAC 173-14-140 for criteria relating to  
5 "uses."

6 The state rule, WAC 173-14-140 for conditional uses, provides that  
7 uses which are specifically prohibited by the master program may not  
8 be authorized.

9 The only issue submitted is whether the disapproval of the "use"  
10 and "area" variance under WAC 173-14-150 was correct.

11 V

12 Mason County granted a "use" variance from the prohibition of  
13 section 7.16.200. This is a proper procedure under the shoreline  
14 master program. Department of Ecology review of "use" variances is  
15 evaluated using the criteria for conditional uses in WAC 173-14-140.  
16 See WAC 173-14-150(5).

17 WAC 173-14-140(3) provides that "uses which are specifically  
18 prohibited by the master program may not be authorized." Section  
19 7.16.200 of the master program prohibits residences from being built  
20 on pile piers and docks. Webster's dictionary defines "piling" as  
21 pile driven; or logs suitable for or ready to be made into piles.  
22 Clearly the existing dock does not fit into this category.

23 XI

24 Appellant must show that the variance criteria of WAC 173-14-150  
25 (2 through 4) is also met with respect to section 7.20.010.C.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
SHB No. 82-41: MINORITY OPINION

1 Appellant showed that the strict application of the bulk,  
2 dimensional or performance standards in the master program interfered  
3 with a reasonable use of the property, which use is not otherwise  
4 prohibited. WAC 173-14-150 (2a, 3a). The lot is divided by a county  
5 road requiring setback provisions waterward of the road; while that  
6 part of the property landward of the road is very steep.

7 Appellant's intended use would be precluded or significantly  
8 interfered with by section 7.20.010.C. Such hardship is specifically  
9 related to the property and master program provision and not the  
10 applicant's own action. WAC 173-14-150 (2b, 3b).

11 The design of the proposed development would be compatible with  
12 existing structures and uses in the area and would be compatible with  
13 permitted uses within the rural or urban environment designation. WAC  
14 173-14-150 (2c, 3c).

15 The variance authorized would not be a special privilege not  
16 enjoyed by the majority of the properties in the area.

17 Neither the public rights of navigation, use of the shoreline, or  
18 public interest will suffer substantial adverse or detrimental  
19 effect. WAC 173-14-150 (2e, 3e, 3f).

20 The cumulative impact of granting other variances, where a lot has  
21 been partially developed for residential use under proper authority,  
22 as has this lot, would be small. The chronology of events would be  
23 difficult to duplicate.

24 Appellant showed that all of the criteria of WAC 173-14-150 (2  
25 through 4) were met as required by that regulation. Accordingly, the  
26 respondent's decision should be reversed.

VII

Appellant has no vested rights under the Shorelines Management Act. The building permit he received was a result of an oversight by Mason County. The remedy for appellant's apparent reliance on the building permit is a matter to be addressed to the county.

VIII

Any Finding of Fact which should be deemed a Conclusion is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The disapproval of the variance is reversed.

DONE this 21<sup>st</sup> day of April, 1983.

SHORELINES HEARINGS BOARD

  
LAWRENCE J. BAULK, Member